



**HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

**CASE NO: 94248/2019**

DELETE WHICHEVER IS NOT APPLICABLE  
(1) REPORTABLE ☒ YES ☐ NO  
(2) OF INTEREST TO OTHERS JUDGES ☒ YES ☐ NO  
(3) REVISED  
5 JULY 2023  
DATE SIGNATURE

In the matter between:

**ESKOM HOLDINGS SOC LIMITED**

Applicant

and

**EMFULENI LOCAL MUNICIPALITY**

First Respondent

**MUNICIPAL MANAGER OF  
EMFULENI LOCAL MUNICIPALITY**

Second Respondent

**NATIONAL ENERGY REGULATOR OF SOUTH AFRICA**

Third Respondent

**PREMIER, GAUTENG**

Fourth Respondent

**ADMINISTRATOR OF EMFULENI  
WILLY BHILA NO.**

Fifth Respondent

**MUNICIPAL MANAGER OF EMFULENI  
LOCAL MUNICIPALITY LUCKY SEANE**

Sixth Respondent

and

**EMFULENI FOR CHANGE NPC**

First Intervening Party

**ATC (PTY) LIMITED t/a CBT**

**ELECTRIC AFRICAN CABLES**

Second Intervening Party

**SCAW SA (PTY) LIMITED**

Third Intervening Party

**HALL LONGMORE HOLDING (PTY) LIMITED**

Fourth Intervening Party

**Summary:**

The relief sought is for the Emfuleni Local Municipality and its Municipal Manager to be declared in contempt of the Full Court's order issued on 18 November 2018, and to order a just and equitable remedy pending the hearing of Part B of the application that was before that Full Court "Cape Gate". The interim relief sought is intended to benefit entities that have joined as intervening parties in the contempt application. That will include a further 216 businesses that are represented by the intervening parties.

The relief obtained in the Full Court was primarily that the applicants pay Eskom's portion of the electricity bills issued by Emfuleni to its customers who are resident within its jurisdiction directly to Eskom. Eskom's complaint was that it is unable to discharge its constitutional obligations to generate and supply bulk electricity to Emfuleni because of the ever escalating debt owed to it due to non-payment for bulk electricity by Emfuleni.

The dispute between Eskom and Emfuleni was categorised as a dispute between organs of state and subject to resolution under Chapter 4 of the Constitution and subject to the Intergovernmental Relations Framework Act. The National Electricity Regulator of South Africa ("NERSA") is empowered by the Electricity Regulation Act ("ERA") to facilitate the resolution of this dispute.

Held:

- [1] In the circumstances, the following Order is made:
  - 1.1. The following parties are granted leave to intervene in the above application;
  - 1.2. Emfuleni for Change NPC, as the first intervening applicant;
  - 1.3. ATC (Pty) Ltd, trading as Cbi-Electric African Cables, as the second intervening applicant;
  - 1.4. Scaw South Africa (Pty) Ltd as the third intervening applicant;
  - 1.5. Hall Longmore Holdings (Pty) Ltd as the fourth intervening applicant.
- [2] The first respondent, ("Emfuleni"), is declared to be in contempt of the Full Court order issued on 18 November 2018 and the failure of Emfuleni to pay the first applicant, ("Eskom"), for continued provision of electricity is declared unlawful and unconstitutional.
- [3] The second respondent, the Municipal Manager, is declared to be in contempt of the Full Court order issued on 18 November 2018 and the failure of Emfuleni to pay the first applicant, Eskom, for continued provision of electricity is declared unlawful and unconstitutional.
- [4] The third respondent ("NERSA") has failed to implement appropriate measures to address Emfuleni's non-performances with its license conditions and to safeguard the interests of Eskom and the first to fourth intervening applicants, and such failures are declared to be unlawful and unconstitutional.

- [5] Emfuleni must appoint Eskom as its service delivery agent and provider to perform all functions and provide all services relating to Emfuleni's electricity business on behalf of Emfuleni (the "Agency") and as service delivery agent and provider:
- 5.1. Eskom shall be entitled to collect all revenues due to the Emfuleni in respect of the electricity distribution function and ensure that the funds are paid into a separate ring-fenced account to be opened in the name of Emfuleni (the "Account");
  - 5.2. Eskom shall be authorised to charge to the Account all costs and expenses incurred by Eskom in discharging its duties in terms of the Agency and the amounts which Emfuleni is liable to pay Eskom for the electricity supplied by Eskom calculated at NERSA approved tariffs.
  - 5.3. Emfuleni shall pay Eskom, in relation to the services rendered by Eskom in respect of the Agency, such amounts as NERSA may determine from time to time on application by Eskom;
  - 5.4. In relation to the Agency, Eskom shall account to Emfuleni quarterly and pay the net revenue (calculated as the difference between the Eskom tariff and Emfuleni's municipal tariff less the costs envisaged in terms of paragraphs 4.2 and 4.3 above) over to Emfuleni.
- [6] Eskom and Emfuleni, subject to appropriate oversight from NERSA, must finalise the terms of the agreement established by this order within six months of the date of this order.
- [7] The agreement which shall contain the provisions stipulated under 5 and details and dates regarding how the electricity business of Emfuleni will be handed over to Eskom to enable Eskom to perform its functions as service delivery agent of Emfuleni.
- [8] Pending the finalisation and implementation of the Agreement between Eskom and Emfuleni and with immediate effect:
- 8.1. The 1st to 8th applicants in the Cape Gate matter and the Emfuleni electricity customers (listed in Schedule "A" to Eskom's Notice of Motion) are authorised and directed, subject to appropriate oversight by NERSA, to discharge the debts which they incur to Emfuleni in respect of the ongoing supply of electricity to them by: -
    - 8.1.1 Making payment directly to Eskom for the electricity they consume at the rate of the Eskom tariff and furnishing to Emfuleni proof of the payments made to Eskom;
    - 8.1.2 Continuing to pay the difference between municipal tariff and the Eskom tariffs (i.e. the municipal portion) to Emfuleni.
  - 8.2. Eskom is authorised and directed to issue invoices to the electricity customers which specify the Eskom tariff (the amount to be paid to Eskom for the electricity supplied under the invoice) and the Emfuleni tariff (the amount to be paid to Emfuleni for electricity supplied under the invoice) separately and Emfuleni will assist and cooperate with Eskom in this regard which includes furnishing the details of customers and allow Eskom to repair and install new or parallel meters at the supply points of the customers.
- [9] Eskom's appointment as service delivery agent may only be terminated by agreement between Eskom, Emfuleni and NERSA, failing which this Court, after being satisfied that Emfuleni has developed sufficient administrative, financial and technical skills and capacity to discharge its obligations under the licence

efficiently, accurately and sustainably to ensure access to a stable supply of electricity to residents of Emfuleni.

- [10] If Eskom and Emfuleni are unable to finalise the terms of the agreement within six months:

10.1 Eskom and Emfuleni will file a Report to the Court within fourteen days of the expiry of the six-month period which sets out the steps taken to conclude the agreement pursuant to the order, the aspects in respect of which there are agreements and the aspects in respect of which there are disagreements.

10.2 Following the filing of the Report, any party is permitted to file a supplementary affidavit and to set the application down before the Court for appropriate relief on not less than fourteen days' notice to the other parties.

- [11] Emfuleni and NERSA, jointly and severally, the one paying the other to be absolved, are ordered to pay the costs of all the applicants, and such costs are to include the costs of two counsel.

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## JUDGMENT

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This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down are deemed to be 5 July 2023.

### **The Court (Coram Baqwa, Malindi JJ and de Vos AJ)**

#### *Introduction*

- [1] We find it regrettable when the judicial system becomes clogged up, and the courts become preoccupied with cases which in terms of the Constitution ought to be resolved by state organs. As will become apparent in this instance, there seems to be an unwillingness, ineptitude, lack of capacity or inability to engage meaningfully in order to bring about effective solutions to disputes concerning the provision of/or payment for electricity. The judiciary has also had to deal with cases that are a result of the omnipresent rampant corruption and maladministration. When the issues become deadlocked as a result of these factors and when an impasse is reached, the regrettable consequence is that it is the citizens and businesses who suffer the inevitable failures with regard to delivery of basic services and commodities such as water and electricity.

- [2] The situation has manifested itself in a long-running dispute between Eskom and numerous municipalities such as Emfuleni Local Municipality (“Emfuleni”) which is the first respondent in this matter, and which is alleged not to be paying Eskom for the bulk electricity it supplies to the municipality.
- [3] In this regard, we share the sentiments expressed by Madlanga J writing for the majority in *Eskom Holdings SOC Limited v Vaal River Development Association (Pty)Ltd and Others*<sup>1</sup> when he stated as follows:

“It is deeply disturbing that – through no fault of their own – the residents of the Lekwa and Ngwathe Municipalities (residents) are subjected to a situation that violates several of their fundamental rights protected in the Bill of Rights. A situation that infringes their right to dignity, their right of access to healthcare services, their right of access to sufficient water, their right to an environment that is not harmful to health or well-being and the right to basic education. The residents add that there is even a threat or real risk of infringement of the right to life. All this, as a direct consequence of Eskom’s conduct. I say all this is happening through no fault on the part of the residents because they say that the two municipalities have a prepaid electricity system and that they (the residents) do pay their dues. That notwithstanding, they find themselves caught up in the dispute between Eskom and the errant municipalities. A dispute at the centre of which is the woeful and reprehensible failure by the municipalities to pay Eskom for the electricity it supplies, and which I do not condone in the least. A classic, practical and painful manifestation of the saying, “When two elephants fight, it is the grass that gets trampled.”<sup>2</sup>

- [4] This matter is not only about Emfuleni’s failures to pass on Eskom’s portion of electricity bills but also about the failures of organs of state to act in terms of section 41(3) of the Constitution of the Republic of South Africa which obliges all spheres of government and all organs of state within each sphere “to make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose ...” The said mechanisms and procedures are contained in the Intergovernmental Relations Framework Act, 13 of 2005 (“the IRFA”).

## Parties

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<sup>1</sup> [2022] ZACC 44.

<sup>2</sup> Id at para 189.

- [5] The first applicant is Eskom Holdings SOC Ltd ("Eskom") which plays a developmental role and must promote universal access to electricity at affordable prices as provided for in section 6(5) of the Eskom Conversion Act No 13 of 2001.
- [6] The first respondent is Emfuleni Local Municipality ("Emfuleni") to whom, in fulfilment of its legislative obligations Eskom generates and supplies electricity. Emfuleni, in turn, sells or supplies the electricity to customers and/or end-users within its municipal area at marked-up tariffs to raise revenue to fund operations.
- [7] The second respondent is the Municipal Manager of Emfuleni, Oupa Nkoane at the relevant time, who is also cited in his personal capacity as the person responsible for the administration of the affairs of Emfuleni.
- [8] The third respondent is the National Energy Regulator of South Africa ("NERSA") a regulating authority established in terms of section 3 of the National Energy Regulator Act of 2004.
- [9] The fourth respondent is the Premier of the Gauteng Provincial Government, Mr David Makhura, who is cited in his official capacity as the person responsible for the intervention by the Gauteng Provincial Government into the affairs of Emfuleni, as provided for in terms of section 139 of the Constitution.
- [10] Emfuleni for Change represents its members who are various industries and businesses operating within the municipal area of Emfuleni. They also represent many residents and ratepayers of Emfuleni and consumers of electricity within the municipal area of Emfuleni.
- [11] African Cables is a major employer in the Emfuleni region and a major consumer of electricity. It conducts business as a manufacturer and supplier of electrical cables and conductors for use in bulk electrical infrastructure.
- [12] Scaw is also a major employer and consumer of electricity. It is a manufacturer. Scaw conducts business as a manufacturer and supplier of steel chains for use in the mining industry, construction industry, oil and gas industry, general industrial purposes, lifting and rigging.

[13] Similarly, Hall Longmore is a major employer and conducts business as a manufacturer of steel pipes and coating.

[14] Emfuleni for Change, African Cables, Scaw and Hall Longmore applied for leave to intervene as parties. Their applications to intervene were consented to by the parties. At the commencement of these proceedings leave was granted for the four intervening applicants to be joined as applicants in support of Eskom's application. They will be referred to collectively as the Intervening Applicants.

*Relief sought*

[15] The relief sought from this Court has evolved during the course of litigation. Eskom sought relief, stated broadly, for the Court to find Emfuleni in contempt of Court, terminate its agreement with Emfuleni, mandate NERSA to investigate (and impose remedial measures) and permit the end-users in Emfuleni to pay Eskom directly - with Eskom then paying Emfuleni's portion back to it.<sup>3</sup>

[16] The Intervening Applicants proposed a different remedy, namely that Eskom acts as agent of Emfuleni with necessary amendments to Emfuleni's license with NERSA.<sup>4</sup>

[17] At the hearing, Eskom presented a draft order which, in the main, adopted the relief proposed by the Intervening Applicants with additional prayers aimed at the practical implementation of the relief.

[18] The relief proposed by Eskom at the hearing in the draft order, broadly, is for-

18.1.A declarator that Emfuleni's failure to pay Eskom is unlawful and unconstitutional.

18.2.A declarator that NERSA's failure to implement appropriate measures to address Emfuleni's non-performance with its license conditions and to safeguard the interests of Eskom and the intervening applicants is unlawful and unconstitutional.

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<sup>3</sup> Notice of motion dated 18 December 2019 (Filed on 20 December 2019).

<sup>4</sup> Notice of motion: Intervening Applicants dated 4 December 2020.

18.3. Emfuleni must appoint Eskom as its service delivery agent, with NERSA's oversight, within 6 months of the order. The draft spells out what obligations Eskom as a service delivery agent would have. The draft then provides what happens in the event of the agency agreement not being concluded within 6 months and provides for the termination of the agency agreement.

18.4. Whilst the agency agreement is being concluded, the bills of the electricity users in Emfuleni must indicate the portion to be paid to Eskom and the portion to be paid to Emfuleni.

[19] The core difference between the relief proposed by the Intervening Applicants in their papers and that presented to the Court by Eskom was that Eskom did not request the Court to alter Emfuleni's license. Instead, Eskom's draft order proposed that Eskom and Emfuleni are to agree on terms for Eskom to act as a service delivery agent for Emfuleni whilst Emfuleni got its house in order.

[20] During argument, NERSA, broadly, accepted the relief set out in the draft order. NERSA expressed its satisfaction with Eskom being the service delivery agent of Emfuleni. It became common cause that Eskom frequently plays this role in other Municipalities subject to the signing of service level agreements - similar to what is being proposed in this matter.

[21] Initially, Emfuleni's stance on the relief proposed in the notice of motion and at the hearing was that this Court is not empowered to grant this relief because to do so would violate the principle of separation of powers. Emfuleni's position was that Eskom had other relief available to and that the application ought to be dismissed with costs.

#### *The origins of the case*

[22] Eskom, Emfuleni and NERSA fall within the definition of "organ of state" in terms of section 239 of the Constitution and they are called upon to act in a manner that serves the interests of the citizens by providing access to affordable electricity.

- [23] Eskom contends that Emfuleni is failing to comply with its contractual and statutory obligations in that it is failing to pay Eskom for its bulk electricity supply.
- [24] The said failure, amongst others in respect of other municipalities, results in Eskom not being able to comply with its constitutional obligations to generate and supply electricity to citizens.
- [25] Eskom further contends that it has taken all conceivable steps to get Emfuleni to settle its debt without any success. It has amongst other steps negotiated and concluded several Acknowledgements of Debt and Repayment agreements with Emfuleni which have not been honoured.
- [26] This case must be considered in the preceding context where during 2018 Eskom demanded that NERSA and the Provincial Government take steps to address Emfuleni's omissions. None of those efforts bore any fruits and by mid-2018, Eskom decided to interrupt the electricity supply of Emfuleni during certain hours of the day ("the electricity interruption decision"). The electricity interruption decision resulted in several large power users of Emfuleni launching urgent applications during 2018 which were argued in October 2018.
- [27] The urgent applications were aimed at interdicting and restraining Eskom from implementing the interruption decision pending the review thereof. NERSA was cited as one of the respondents.
- [28] The urgent applications were consolidated and decided upon by the Full Court sitting at the Johannesburg High Court. The bench comprised of Makume, Van der Linde and Keightly JJ, and is referred to as the Full Court. The decision of the Full Court is reported as *Cape Gate (Pty) Ltd and Others v Eskom Holdings SOC Ltd and Others*.<sup>5</sup> The applicants were a host of businesses<sup>6</sup> and the respondents were Eskom, NERSA, Emfuleni and the Premier.
- [29] The relief sought, as summarised by the Court was as follows -

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<sup>5</sup> 2019 (4) SA 14 (GJ) ("Cape Gate" or the "Full Court").

<sup>6</sup> The specific businesses are: Cape Gate (Pty) Ltd; ACT (Pty) Ltd t/a CBI-Electric; African Cables; Scaw South Africa (Pty) Ltd; Naledi Ringrollers, a subsidiary of Naledi Holdings (Pty) Ltd; Consolidated Wire Industries (Pty) Ltd; Glotan Steel (Pty) Ltd; South African Role Company (Pty) Ltd and Emerald Safari Resorts.

29.1. The Part A interim relief included, apart from the primary prayer, three alternative prayers. The first alternative prayer was for an order directing Eskom, pending the review, to supply electricity on an uninterrupted basis to Emfuleni *"on the basis that the applicant(s) will make direct payment to the 1<sup>st</sup> respondent for the supply of electricity to it"*.

29.2. The second alternative prayer was to order Emfuleni and/or the 4<sup>th</sup> respondent (*"the Premier"*) immediately to pay all outstanding amounts due to Eskom for the supply of electricity to Emfuleni in order to ensure that an uninterrupted supply of electricity is provided to the 2<sup>nd</sup> respondent from 6 August 2018.

29.3. In the third alternative prayer, the applicants asked for an order that Eskom, Emfuleni, and/or the Premier are ordered to agree, within three days, a payment plan in respect of Emfuleni's indebtedness to Eskom so as to ensure that an uninterrupted supply of electricity is provided to Emfuleni. The 5<sup>th</sup> to 8<sup>th</sup> applicants did not join in asking for the alternative relief.

[30] The applicants' contended that they satisfied the test for a prima facie right since the harm to them, if Eskom were permitted to implement its decision to interrupt the supply of electricity to Emfuleni, was cataclysmic.

[31] The Full Court made an order in the following terms:

"(174) In the circumstances the following order is issued:

- (a) The dispute between the four respondents concerning the non-payment by the second respondent to the first respondent for bulk electricity supply and the manner and timing of its resolution given the intervention of the fourth respondent is, in terms of section 41(4) of the Constitution, referred back to the respondents for resolution in terms of section 41(3) of the Constitution.
- (b) In the event that the said dispute is not resolved within six months of the date of this order, any party may set down an application for determination of Part B.
- (c) The first respondent is interdicted from implementing interruptions in electricity supply to the second respondent pending resolution of the aforesaid dispute within six months of date of this order or, if the dispute is

not so resolved, pending the outcome of the final determination of Part B of this application, whichever is earlier

(d) For as long as the interim interdict ordered above applies:

(i) the applicants are authorised, subject to appropriate oversight by the third respondent in the discharge of its statutory obligations pursuant to the judgment of this Court, to discharge the debts that they incur to the second respondent in respect of the ongoing supply of electricity to them, by:

(aa) making payment directly to the first respondent for electricity they consume at the rate of the Eskom tariff, and furnishing the second respondent proof of such payments to the first respondent;

(bb) continuing to pay, in the case of the second to eighth applicants, the difference between the municipal tariff and the Eskom tariff (i.e. the municipal portion) to the second respondent;

(ii) The second respondent is directed, invoicing the fifth to eighth applicants, to specify separately the Eskom tariff which the second respondent would have paid to the first respondent in respect of electricity supplied by the second respondent to the fifth to eighth applicants under that invoice, were not for this order, and the municipal tariff in respect of such electricity;

(iii) The second respondent is interdicted from interrupting the supply of electricity to the applicants for any reason other than the applicants will not have complied with their payment obligations as set out in this order;

(iv) The respondents, including the third respondent, are directed to do all things necessary and take all reasonable steps to give effect to this temporary order.

(e) Nothing in this order shall detract from the existing obligations and duties owed by the second respondent to the applicants in terms, inter alia, of their license granted to the second respondent by the third respondent, or in terms of any other law."

[32] The Full Court judgment and order were underpinned by a finding that Emfuleni had failed to comply with Electricity Supply Agreement ("ESA") and its statutory

obligations in terms of the Electricity Regulation Act ("ERA"),<sup>7</sup> and its electricity licence.

- [33] The relationship between Eskom and Emfuleni is governed by the ESA which provides as follows:

"9.2 Should payment not be received within a period of 10 (ten) days from the date the account is deemed to have become due and payable in terms of subclause 9.1, Eskom may discontinue the bulk supply to the Distributor and/or terminate the electricity supply agreement after having given the distributor written notice as required in terms of section 11 of the Electricity Act. The amount outstanding shall bear interest compounded monthly from the due date to the date of payment, at a rate per annum equal to the prevailing prime overdraft rate charged by First National Bank of Southern Africa Limited plus 5% (give per centum)."<sup>8</sup>

- [34] Further, the Full Court authorised the applicants who were the large power users to pay amounts which they owed to Emfuleni directly to Eskom. The authorisation was made to curb Emfuleni's debt from spiralling. The effect was that Emfuleni customers make direct payment of Eskom's portion of the electricity bill to Eskom.

- [35] More particularly the Full Court<sup>9</sup> said:

"In this case it would be unjust and inequitable to require of the applicants to continue paying the Eskom margin to Emfuleni, when Emfuleni does not pay that margin, or all of that margin, over to Eskom. This is particularly so in view of both the applicants and Eskom supporting the direct payment relief ..."

- [36] The applicant's contention, as embraced by the Full Court, were that instead of passing on Eskom's portion, Emfuleni was using the money for its everyday operations to the detriment of Eskom's ability to discharge its own mandate.

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<sup>7</sup> 4 of 2006.

<sup>8</sup> CL 001-195.

<sup>9</sup> Cape Gate (above) para 171.

[37] The Full Court in paragraph 174(d) (ii) made an order directing Emfuleni to issue invoices to the fifth to eighth applicants which specified the Eskom tariff separately in order to facilitate the direct payment regime.

[38] The said order was made to enable the fifth to the eighth applicants to know what amounts they had to pay Eskom and what amounts they had to pay Emfuleni.

*Subsequent to the Full Court Judgment*

[39] Significantly Emfuleni refused to comply with the order of the Full Court. In an attempt to justify their contemptuous stance, they contended that the direct payment regime could not be implemented due to NERSA's failure to provide the necessary oversight.

[40] The refusal to comply with the Full Court orders prompted the first to the fourth applicants in *Cape Gate* to launch a contempt of court application on an urgent basis<sup>10</sup> to be heard on 4 February 2020.

[41] The application was argued before Adams J who found in favour of the first to the fourth applicants on 6 February 2019.<sup>11</sup>

[42] Emfuleni applied for leave to appeal against the judgment of the Full Court but the application for leave to appeal was dismissed with costs.

[43] Emfuleni petitioned the Supreme Court of Appeal for leave to appeal the judgment and orders of the Full Court, but their petition was refused with costs.

[44] Emfuleni's attempt to resist implementing the judgment and orders of the Full Court has been unsuccessful for both the Municipal Manager who is cited as a second respondent in the present application and Emfuleni even though they persist in their contemptuous conduct.

[45] Eskom's fears of Emfuleni's electricity debt spiralling out of control have become a reality. From the time the Full Court interdicted Eskom from exercising the electricity interruption decision on 8 November 2018, the electricity debt of

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<sup>10</sup> CaseLines 001-3.

<sup>11</sup> CaseLines 001-248.

Emfuleni had escalated from R1 billion in 2018 to R3,5 billion in 2021 and it continues to grow.

- [46] The debt of Emfuleni is rising despite Emfuleni's electricity customers paying it for electricity. The payments which Emfuleni pays in respect of the Eskom debt have proved to be the proverbial drop in the ocean and have made no visible dent in massive debt over time. This has occurred despite investigations showing that Emfuleni collects about 90% of the charges it raises.

#### *The impact on Eskom*

- [47] Emfuleni's failure to service its debt properly has contributed to a cash shortfall in Eskom's operational costs, causing Eskom to recoup the shortfall through borrowings or cash bailouts from Government. This has proved to be not only unsustainable but likely to cause a liquidity crunch which is certain to plunge Eskom into a financial crisis too ghastly to contemplate in terms of consequences not only for itself but also for the country's energy generation ability.

#### *Approach to NERSA*

- [48] NERSA is fully aware of Emfuleni's crisis and the broader crisis involving other municipalities in South Africa. Eskom approached NERSA as the custodian and regulator of the electricity industry with the hope that it would intervene regarding Emfuleni's failure to comply with the prescripts of ERA and its license conditions. NERSA contends that it has been actively trying to intervene but the absence of any results as a consequence of such intervention seems to confirm Eskom's contention that NERSA has effectively done nothing to address the problem.
- [49] Subsequent to the Full Court Judgment and the Adams J judgment, NERSA delivered its affidavit in which it promised to produce its decision on how it was going to deal with the Emfuleni crisis. Eskom waited with great hope for NERSA's decision and kept this application in abeyance. NERSA's decision was to set in motion a tribunal process to deal with Emfuleni and other municipalities. NERSA has the power to appoint a tribunal in terms of section 18 of ERA. During these proceedings, NERSA's counsel conceded that the process fell flat because Emfuleni refused to participate. One of the titles NERSA holds in terms of ERA

is that of being “the enforcer” with the power to compel errant municipalities to comply with the prescripts of ERA and the conditions of the licence issued by NERSA. NERSA has nothing to show in this regard. One of the attempts at deflecting accountability by NERSA was to invoke the incomplete IRFA process. It is common cause that Emfuleni frustrated this process and that NERSA has not taken decisive steps to force all relevant parties to the table.

[50] The intervening applicants are electricity consumers under Emfuleni and they have joined Eskom in their quest to avoid being left without electricity. The impact of lack of electricity will not only impact their business operations but will also lead to loss of invaluable jobs in an already volatile period of unemployment. On 22 November 2019, some of the intervening applicants applied to NERSA for the amendment or revocation of the electricity licence issued by NERSA to Emfuleni. The application was turned down by NERSA without adopting or suggesting any alternative solutions. The electricity management in Emfuleni has continued to deteriorate in full view of NERSA’s watch.

[51] It is under these circumstances outlined above that Eskom has brought this application which is being opposed by both Emfuleni and NERSA.

#### *The law*

[52] The Constitutional Court considered the obligation of local government to supply the electricity in *Joseph and Others v City of Johannesburg and Others*<sup>12</sup> and said the following:

“They further maintained that any right to receive electricity as a basic municipal service is qualified by Emfuleni’s constitutional and statutory obligations to provide public services in a financially sustainable manner.”<sup>13</sup>

“In addition, rights entail responsibilities. Citizens who can, must take responsibility for paying for services provided to them in fulfilment of government’s statutory and constitutional obligations. Government is entitled to

<sup>12</sup> [2009] ZACC 30; 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC).

<sup>13</sup> *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30; 2010 (3) BCLR 212 (CC) ; 2010 (4) SA 55 at para 50.

require this of citizens. Moreover, government regulation is implicit in the notion of providing electricity."<sup>14</sup>

[53] The Court in *Joseph* elaborated on the right to receive electricity as follows:

"The provision of basic municipal services is a cardinal function, if not the most important function, of every municipal government. The central mandate of local government is to develop a service delivery capacity in order to meet the basic needs of all inhabitants of South Africa, irrespective of whether or not they have a contractual relationship with the relevant public service provider. The respondents accepted that the provision of electricity is one of those services that local government is required to provide. Indeed they could not have contended otherwise. In *Mkontwana*, Yacoob J held that "municipalities are obliged to provide water and electricity to the residents in their area as a matter of public duty." Electricity is one of the most common and important basic municipal services and has become virtually indispensable, particularly in urban society."<sup>15</sup>

"The obligations borne by local government to provide basic municipal services are sourced in both the Constitution and legislation. Section 152(1) of the Constitution sets out the objects of local government in general terms, and creates an overarching set of constitutional obligations that are to be achieved in accordance with section 152(2). Section 152 of the Constitution provides:

- "(1) The objects of local government are to provide democratic and accountable government for local communities; to ensure the provision of services to communities in a sustainable manner; to promote social and economic development; to promote a safe and healthy environment; and to encourage the involvement of communities and community organisations in the matters of local government.
- (2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1)."<sup>16</sup>

"In addition to these objects of local government, the Constitution specifically entrenches the developmental duties of municipalities. Under section 153, a municipality is obliged to prioritise the basic needs of the community and to promote the social and economic development of the community."<sup>17</sup>

[54] Chapter 4 of the Constitution deals with cooperative governance and more particularly section 41 requires organs of state such as Eskom, Emfuleni and

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<sup>14</sup> Id at 51.

<sup>15</sup> Id at para 34.

<sup>16</sup> Id at para 35.

<sup>17</sup> Id at para 36.

NERSA to secure the well-being of the people and to exercise their powers and perform their functions in a manner that does not encroach on each other's functional and institutional integrity.

[55] In *Eskom Holdings SOC Ltd v Resilient (Pty) Ltd and Others*,<sup>18</sup> the Supreme Court confirmed that it was "beyond question" that electricity is a component of basic services that municipalities are constitutionally and statutorily obliged to provide to residents.

[56] Section 2 of ERA sets out the objects of the Act, which are to:

"Achieve the efficient, effective, sustainable and orderly development and operation of electricity supply infrastructure in South Africa;

Ensure that the interests and needs of present and future electricity customers and end-users are safeguarded and met, having regard to governance, efficiency and the long-term sustainability of the electricity supply industry;

Facilitate investment in the electricity supply industry and universal access to electricity; and

Facilitate a fair balance between the interests of customers and end-users, licensees, investors in the electricity supply industry and the public"

[57] Section 3 of ERA appoints NERSA as the "custodian and enforcer" of the regulatory framework by ensuring that the objectives of ERA are achieved, that the interests of electricity customers are protected, and the people of South Africa have access to affordable electricity. The provisions contained in ERA impose constitutional and statutory obligations on local government to provide basic municipal services, which include electricity. The applicants are entitled to receive these services. These rights and obligations have their basis in public law. Although, in contrast to water, there is no specific provision in respect of electricity in the Constitution, electricity is an important basic municipal service which local government is ordinarily obliged to provide. The respondents are certainly subject to the duty to provide it. Although *Joseph* and *Resilient* refer to the provision of electricity as a basic service to be provided to residents the principle applies equally to business entities that are resident within a

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<sup>18</sup> 2021 (3) SA 47 (SCA) para 13.

municipality. They are entitled to more than the basic measures as were provided for in *Mazibuko*.<sup>19</sup> Section 152(1)(c) states one of the objects of local government to be "to promote social and economic development". Emfuleni cannot be allowed to undermine economic development in its jurisdiction by starving industry of the electricity that they pay for, let alone as a basic service to the residents in the area.

- [58] In order to achieve the objectives of ERA, NERSA is authorised to issue licences for the generation, transmission or distribution of electricity and to enforce performance and compliance with ERA and licence conditions.<sup>20</sup>
- [59] NERSA is also empowered in terms of section 16 of ERA to vary, suspend or remove any licence condition, or include additional conditions if a licensee fails to comply with its licence conditions or if it is necessary for purposes of achieving the objects of ERA in terms of section 17, to remove the licence of a licensee if another person is willing and demonstrably able to assume the rights and obligations of the licensee.
- [60] If the licensee does not comply with its licence conditions or has contravened or failed to comply with any provisions of ERA, NERSA may in terms of section 18 sit as a tribunal and decide upon the matter and if the allegations are proved to be true to take steps to force the licensee to comply with its licence conditions and ERA.
- [61] NERSA may also, in terms of section 19 apply to a court for an order suspending or revoking a licence if there are "any grounds justifying such suspension or revocation."

#### *The Duties of Municipalities*

- [62] Section 27 deals with the duties of municipalities and determines that each municipality must exercise its authority and duty by progressively ensuring access to basic reticulation services through appropriate investments in its electricity infrastructure; by ensuring sustainable reticulation services through

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<sup>19</sup> *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) (8 October 2009) ("*Mazibuko*")

<sup>20</sup> Section 4 of ERA.

efficient and effective management and adherence to national norms and standards; and by keeping separate financial statements, including a balance sheet of the reticulation business.

### *Emfuleni License*

- [63] The licence issued by NERSA to Emfuleni contains specific provisions to the effect that it is supposed to keep its electricity distribution business separate from its other affairs so that the revenue, costs, assets, liabilities, reserves and provisions made for its electricity business are separately identifiable on its books from those of its other business; it is supposed to annually submit audited copies of its statements to NERSA; it must pay Eskom for the electricity that it purchases from Eskom; it must prepare and adhere to plans which protect customers and ensure the effectiveness of the industry and those plans must include a maintenance schedule, standards of service, enquiries and complaints management, licence compliance management and consumer/public and staff safety education.
- [64] Upon failure by Emfuleni to comply with the above licence conditions the licence determines that NERSA may serve Emfuleni with a notice requiring it to meet its obligations within 30 days or such longer period as NERSA might determine and if Emfuleni fails to comply with the notice, Emfuleni would be guilty of an offence and would be punishable as provided for in terms of ERA.
- [65] NERSA is also authorised to recommend to the Minister to authorise an appropriate undertaker to enter upon and take possession of the business of Emfuleni and NERSA may also withdraw Emfuleni's licence at any time; NERSA also has the power in terms of Licence Condition 7 to amend Emfuleni's licence or in terms of Licence Conditions 8, to revoke the licence.

### *Conduct and failures of Emfuleni*

- [66] Based on the pronouncement by the Constitutional Court in *Joseph* and the Supreme Court of Appeal regarding electricity as a basic commodity and the people's entitlement to have access to it, Eskom has a constitutional duty to

ensure that municipalities can discharge their obligations in terms of the Constitution.

- [67] To ensure access to electricity, Eskom and Emfuleni have a reciprocal duty to work together to comply with their contractual and statutory obligations owed towards each other.
  
- [68] Emfuleni's conduct of failing to pay Eskom for the bulk electricity impedes Eskom from complying with its developmental role and constitutional mandate of generating and supplying electricity to the citizenry and businesses under its jurisdiction. Emfuleni's conduct resulted in a shortfall in Eskom's revenue causing it to resort to borrowings and government bailouts. The catastrophic consequences thus engendered need no emphasis. Residents will be deprived of their constitutionally entrenched right to basic electricity and businesses starved of much needed electricity to run their industries which range from big to small. The consequent losses of jobs will only add to a dire state of unemployment in the Emfuleni region.
  
- [69] A brief reference to Emfuleni's financial statements and published reports will suffice to demonstrate Emfuleni's inept management of its financial affairs. Its revenue generated from electricity sales in the 2019 financial year, increased by R450 million whilst its equitable share from government increased by some R70 million; for the last three years, Emfuleni had collected R4.5 billion from its electricity customers at a collection rate of about 90%.
  
- [70] Sadly, though, Emfuleni's financial statements show that Emfuleni's irregular expenditure amounted to R1 125 676 432.00 and its fruitless and wasteful expenditure amounted to R486 097 380.00. Demonstrably therefore, Emfuleni is not only being mismanaged but worsened by its failure to comply with its obligation to keep its electricity business separate from its other affairs, and NERSA's failure to enforce this obligation which is part of Emfuleni 's licence. This obligation is also prescribed in section 27(1) of ERA. The failure to pay Eskom by Emfuleni is egregious in light of its increased sales whilst its debt to Eskom is ballooning.

- [71] NERSA is an organ of state as defined in section 239 of the Constitution, and one of the key role players mandated to ensure the sustainability of the electricity industry and the framework established in terms of ERA.
- [72] In terms of its mandate, it is called upon to facilitate universal access to electricity; to ensure that the interests of electricity customers and end-users (which include the interests and needs of Emfuleni's customers) are safeguarded and protected; to ensure that electricity supply infrastructure in South Africa is effectively managed and operated in a sustainable and orderly manner.
- [73] Despite the extensive powers granted to NERSA to regulate and enforce all matters related to access to electricity in terms of ERA as set out above, and despite its opposition to Eskom's application, it is regrettable that NERSA has dismally failed to exercise its mandate.
- [74] To avoid burdening this judgment with a detailed account regarding NERSA's omissions, it should suffice to summarise the common cause facts which highlight NERSA's failure to execute its mandate:

74.1. It is not disputed that Emfuleni owes Eskom more than R3.5 billion for electricity and that the debt continues to spiral;

74.2. Eskom concluded at least three Acknowledgement of Debt and Repayment Agreements with Emfuleni and obtained a judgment against Emfuleni;

74.3. When the Emfuleni electricity debt reached R1 billion in 2018, Eskom took the electricity interruption decision;

74.4. On 8 November 2018, the Full Court, sitting at the Johannesburg High Court, delivered the *Cape Gate* judgment.

74.5. Emfuleni has breached the terms and conditions of the ESA and it is operating in breach of the provisions of ERA and its licence conditions by, amongst other things, not paying Eskom for electricity or making ineffective sporadic payments, not maintaining its electricity network, and not keeping its electricity business separate from its other affairs.

- [75] Evidently, Emfuleni contravened and remains in breach of its obligations in terms of ERA and its licence conditions. It is not disputed that the issue was reported to NERSA as far back as 2017/2018. Five years later, NERSA cannot tender even a shred of evidence to contradict the allegation by Eskom that it failed to resolve the matter. It is not sufficient for NERSA to plead that Emfuleni was resistant to the interventions in terms of IRFA. As stated above, NERSA has the authority to enforce the ERA and pay its role under section 41 of the Constitution.
- [76] NERSA was cited as a party in the *Cape Gate* matter in which it was directed, together with other organs of state, to proceed to find a solution to Emfuleni's failures to pay Eskom for the bulk electricity it continues to supply Emfuleni. It is common cause that both Emfuleni and NERSA have not complied with the said order about five years later and despite the order referring the matter back to the state organs in terms of section 41(4) of the Constitution.
- [77] The only logical conclusion to be drawn is that NERSA intentionally refuses and/or fails to act against Emfuleni to address its failures to comply with ERA and its licence conditions.
- [78] Both NERSA and Emfuleni are obliged to work with Eskom to secure the well-being of all persons and to perform their functions in a manner that does not encroach on the functional and institutional integrity of Eskom. The residents and businesses of Emfuleni are entitled to have access to electricity and if NERSA and Emfuleni are not making this possible for Eskom to comply with its obligations in terms of the Constitution, they are violating the provisions of the Constitution.
- [79] In light of the above, the Court concludes that both NERSA and Emfuleni have acted in contempt of the *Cape Gate* order and that their conduct is both unconstitutional and unlawful.

*Just and equitable relief*

- [80] The Court is being called upon to engage its powers under section 172(1)(b) of the Constitution to grant just and equitable relief. This Court's powers under the section are broad and intentionally so. No legal principle is immune to a court's

just and equitable jurisdiction under section 172(1)(b). There is no legal stricture which takes precedence over the obligation of the courts to do justice between the parties.<sup>21</sup> The Court may grant just and equitable relief even at odds with extant statutory provisions.<sup>22</sup> If a breach of rights has been established, Courts are not only empowered to grant just and equitable relief but are mandated to grant appropriate relief.<sup>23</sup>

- [81] Courts have to forge new tools and shape innovative remedies if needs be, to achieve this goal.<sup>24</sup> *Fose*<sup>25</sup> enjoins Courts to afford litigants just and equitable remedies when the law does not provide ready remedies.
- [82] As stated above, the *Cape Gate* Judgment granted Eskom interim relief pending the adjudication of Part B. The interim relief was for 6 months. For the reasons stated above, Part B was not prosecuted for nearly two years.
- [83] Emfuleni accuses the applicants of seeking to bypass the adjudication of Part B and obtain final relief in this Court, and secondly, to extend the number of the beneficiaries of the interim relief to include the 216 other businesses as annexed to the intervening parties' notice of motion.
- [84] The respondents, in particular Emfuleni, have argued vociferously that the applicants are not entitled to bypass the prosecution of Part B and that to grant the orders prayed for would be tantamount to making a contract on behalf of the parties and that such an order would violate the separation of powers between the judiciary and the executive at the local government sphere.
- [85] On the other hand, the applicants have submitted equally vigorously that this Court is authorised to interfere in the circumstances in view of the respondents' conduct which has served only to frustrate the interim relief, exacerbated by their failure to employ their powers under section 41 of the Constitution.

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<sup>21</sup> *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* 2018 (2) SACR (CC) at para 77 ("Corruption Watch").

<sup>22</sup> *Electoral Commission v Mhlope* 2016 (5) SA 1 (CC) at para 130; *Corruption Watch NPC* (above) at para 71.

<sup>23</sup> Section 38 of the Constitution; *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) at para 52.

<sup>24</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786.

<sup>25</sup> *Id* para 69.

[86] Despite what the respondents have submitted, this Court has found and declared that the respondents' conduct is inconsistent with the Constitution and therefore invalid to the extent of their non-compliance with the *Cape Gate* order in terms of section 172(1)(a) of the Constitution.

[87] The Court must, therefore, not shy away from the challenge raised by the litigants purely because another court had dealt with some of the facts. This will be the case where the facts are evolving and presenting differently over a period of time.

#### *A state of disaster*

[88] Relief that is just and equitable must, at its core, provide a practical and workable remedy which strikes at the real challenge.

[89] There is no dispute that Emfuleni owes Eskom. The difficulty is finding adequate language to describe the scale of the debt. For comparison, in *Eskom Holdings SOC Limited v Letsemeng Local Municipality and Others*<sup>26</sup> the Supreme Court of Appeal stated that the Letsemeng Municipality's debt of R41 million was "astronomical". In this case, the debt was R2 billion when the case commenced and increased by more than R1.5 billion during litigation. The current debt is eighty-five times what was described as an "astronomical" debt in *Letsemeng*.

[90] Helpfully, counsel for the Intervening Applicants highlighted the difference between a million and a billion in a different metric. If millions were conceptualised in time units, then a million would be one day and a billion would be three years. The real challenge in this case is the astronomical scale of the Emfuleni debt.

[91] Emfuleni concedes that it does not have billions to repay its historic debt.<sup>27</sup> It also concedes that it has been "beseeched by lack of financial discipline" and "maladministration".<sup>28</sup> Emfuleni says it will be not be able to repay this debt.

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<sup>26</sup> [2022] 2 All SA 347 (SCA) (9 March 2022).

<sup>27</sup> Answering Affidavit para 10.

<sup>28</sup> Answering Affidavit para 62.

- [92] Not only is the debt gigantic in scale, but it is also dynamic. It grows with every month Emfuleni does not pay and compounds in interest. Emfuleni's payment due to Eskom is hundreds of millions of rands every month.
- [93] Emfuleni does not deny it is in debt but complains that Eskom must ring-fence the debt. Emfuleni's stance, stripped to the bone, is that it will not be able to settle this debt, as to attempt to do so would leave it with no money to run its other affairs. Ring-fencing a debt of the magnitude referred to above, in these circumstances, does not make economic sense.
- [94] In light of the sheer scale of the debt, the Court rejects Emfuleni's characterisation of the dispute as one of a debt being owed capable of redress through a monetary judgment. Eskom may be perceived to be at liberty to seize all of Emfuleni's assets to satisfy the judgment, but that is likely to compound the problem by worsening the dysfunctional state which already exists within Emfuleni. That is unlikely to resolve Eskom's liquidity in light of the size of the debt.
- [95] In any event, Eskom has obtained money judgments which have resulted in the attachment of Emfuleni's assets. This is not a feasible way to settle a R3 billion debt. Nor does it resolve the true issue between the parties which is that Emfuleni is unable to pay its debt.
- [96] The scale of the debt has given rise to a state of disaster so grand that a money order will not be appropriate relief. The Court finds that Emfuleni has yet to realistically confront the state of the disaster it has created.
- [97] Whilst much of the focus of the litigation is Emfuleni's non-payment for electricity services, the case involves much more than money. Eskom's ability to provide electricity is threatened by Emfuleni's financial delinquency but also by Emfuleni's broader dysfunction.
- [98] Eskom is being hampered in providing services to the rest of the country as Emfuleni does not comply with requests to regulate electricity as part of load-shedding. When Eskom needs to shed the load, it requests Emfuleni to do so. Emfuleni responds that it is not in a position to do so as it lacks the capacity to

switch off the power. The effect of a municipality failing or refusing to cooperate with Eskom to ensure load-shedding is a potential collapse of the entire national grid. The threat, says Eskom, is a national black-out.

- [99] The Court accepts that the true challenge before it is to address the state of disaster which extends beyond the mere inability to pay a debt.

### *Constitutional impact*

- [100] The impact of Emfuleni's dysfunction has apparent constitutional dimensions. Electricity is a basic municipal service which is virtually indispensable.<sup>29</sup> It is "one of the most common and important basic municipal services".<sup>30</sup> The applicants before the Court range from NGO/residents associations and businesses. Emfuleni's refusal to pay Eskom for electricity places this right at risk for all within the area of the jurisdiction.

- [101] Beyond the everyday electricity users within Emfuleni are the businesses and industries within Emfuleni. The Intervening Applicants represent some of these industries and businesses operating within the area of Emfuleni. They rely on Emfuleni for electricity which they need to run their enterprises. Emfuleni's failure to pay Eskom places the Intervening Applicants' businesses and the industries they serve at risk. The impact extends beyond the businesses as the non-viability of these businesses affects the livelihoods of those dependent on businesses in the municipal area.

- [102] The Intervening Applicants have set out<sup>31</sup> the various aspects of life affected by electricity. They contend that the supply of electricity is central to the realisation, promotion, protection and fulfilment of several rights in the Bill of Rights, including dignity, trade and occupation, food security and healthcare, basic nutrition for children, schooling, equality and housing. Electricity drives the supply of water and sewage pumps. It promotes health and safety. It is critical for education and healthcare. It facilitates the very basic tenets of life that the Constitution protects.

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<sup>29</sup> Joseph (above) at para 34.

<sup>30</sup> *Id.*

<sup>31</sup> Heads of Argument of the Intervening Applicants at para 24.

- [103] Eskom can only do its job if Emfuleni pays it for services. Eskom provides the indispensable service of generating and supplying electricity. The Court in *Cape Gate* held without controversy that this "country ... cannot exist and the economy cannot function without Eskom remaining economically viable".<sup>32</sup> Emfuleni is making Eskom's job impossible. Emfuleni's failure to pay Eskom contributes to a shortfall in Eskom's operational expenses. Eskom must recoup that shortfall through borrowings and government bailouts. The unsustainability of this model is a concrete reality in the life of every person living in South Africa. As cited by Eskom, the consequences are catastrophic, and the harm unquantifiable.
- [104] Eskom has a constitutional duty to ensure that municipalities can discharge their obligations. Eskom, as an organ of state, is obliged to secure the well-being of the people.<sup>33</sup> Eskom cannot meet this constitutional obligation whilst Emfuleni does not pay it. Emfuleni's conduct is placing Eskom in an impossible position. Eskom cannot fulfil its constitutional service delivery obligations when its customers (municipalities) do not pay it for the electricity that they consume and which Eskom must supply. This non-payment threatens Eskom's ability to service the country's electricity needs.<sup>34</sup>
- [105] Emfuleni is obligated to exercise its powers and perform its functions in a manner that does not encroach on another organ of the state's functional and institutional integrity.<sup>35</sup> The Supreme Court of Appeal has found that it is irrational for an organ of state to act in a manner that renders another organ of state unable to discharge its obligations to provide services, including electricity, to residents.<sup>36</sup> It is also responsible for ensuring the provision of services to communities sustainably and promoting social and economic development.<sup>37</sup>
- [106] Emfuleni has acted in a way that undermines the ability of Eskom to fulfil its constitutional obligations of generating and supplying electricity.

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<sup>32</sup> *Cape Gate* (above) para 148.

<sup>33</sup> Section 41(1)(b) of the Constitution.

<sup>34</sup> *Cape Gate* (above) para 148.

<sup>35</sup> Section 41(1)(b) of the Constitution.

<sup>36</sup> *Resilient* (above) para 88.

<sup>37</sup> Section 152(1)(b) of the Constitution.

[107] Emfuleni is also under a constitutional duty to provide services sustainably and manage its budgeting and plan to prioritise the basic needs of communities, including electricity supply.<sup>38</sup> The apex Court has identified the obligation to provide services, including electricity, as "a cardinal function, if not the most important function, of every municipal government."<sup>39</sup> The obligation carried by Emfuleni to provide electricity is a constitutional obligation.<sup>40</sup> It is, furthermore, a statutory<sup>41</sup> and public duty.<sup>42</sup>

[108] The dispute between Eskom and Emfuleni gains a constitutional dimension in light of the right to electricity at play as well as the engagement between organs of state. The cooperation needed between organs of state to be able to comply with their constitutional obligations qualifies as a constitutional matter.<sup>43</sup>

[109] Emfuleni is acting outside its statutory and constitutional obligations. Emfuleni has also ignored carefully crafted judgments seeking to avoid Eskom having to approach the Court in this fashion. It is our courts' duty to vindicate the rule of law. The case is not one of debt collection but rather one which calls on matters that affect the country, prevent a national black-out, and access to those fundamental rights to which electricity is a conduit.

[110] Emfuleni's response to the applicants' reliance on section 172(1)(b) is that the Court can only grant just and equitable relief after a finding of unconstitutionality in terms of section 172(1)(a). Emfuleni's opposition is not born out by jurisprudence. The position adopted by the Constitutional Court is that a court may exercise its just and equitable powers in section 172 even if there was no finding of unconstitutionality.<sup>44</sup> The Court, therefore, rejects Emfuleni's principal objection to the Court exercising its powers under section 172.

### *Just and equitable*

<sup>38</sup> Sections 152 and 153 of the Constitution.

<sup>39</sup> Joseph (above) para 34.

<sup>40</sup> Joseph (above) para 40; Resilient (above) para 13.

<sup>41</sup> Joseph (above) para 40.

<sup>42</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) para 13.

<sup>43</sup> Cape Gate (above) para 55.

<sup>44</sup> *Head of Department : Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) para 97.

[111] The relief sought is an order permitting Eskom to take over the electricity business from Emfuleni in terms of an agreement reached with Emfuleni. Whilst Eskom and Emfuleni iron out the agreement's details, the end-users will pay Eskom directly.

[112] It weighs with the Court that Eskom has taken every conceivable step before approaching this Court. It has sought governmental intervention at every level. It has obtained money judgments. It has negotiated and renegotiated with Emfuleni. It has turned to NERSA. NERSA's position in this Court has been an acknowledgement of its failures as a regulator. NERSA conceded, at the hearing, that its conduct was inappropriate. There is, at the date of the hearing, no basis for hope that Emfuleni will comply with its obligations or that NERSA will hold it to account.

[113] The relief proposed means that Emfuleni still gets the percentage of markup it is entitled to. Financially, the order will not be to the detriment of Emfuleni. Emfuleni's revenue stream is heavily reliant on this markup. The relief proposed leaves the markup due to Emfuleni intact. It will merely appropriate what belongs to Eskom to Eskom.

[114] Practically, the order will mean that Eskom undertakes the reticulation of electricity in Emfuleni. The parties before the Court did not dispute that this would be within Eskom's capabilities. The Court has also been presented with the necessary factual foundation that Eskom can undertake this task. The Court is therefore satisfied that the relief is possible of implementation.

[115] The relief leaves the nitty gritty to the parties. Leaving the execution to of the order to the parties is in line with the Constitutional Court's decision in *Ramakatsa v Magashule*<sup>45</sup> which allows the operation of the just and equitable relief for determination between the parties. The relief also means the Court has not undone Emfuleni's licence or agreements. It forces state organs to find the details amongst themselves within the confines of a practical and implementable solution. The relief is not final but subject to a procedure to break any deadlock.

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<sup>45</sup> 2013 (2) BCLR 202 (CC).

[116] The Intervening Applicants are private citizens and businesses who incurred costs to come to Court. They have not received a responsible state response from Emfuleni nor from NERSA. They are successful in their application before this Court. On this basis, they are entitled to their costs. Moreover, they have come to Court to assert fundamental rights, which means they would be entitled to their costs on this basis also.

[117] Eskom, similarly, has come to Court to assert constitutional principles and is successful in its application. It has taken every conceivable step to avoid litigation. It is also entitled to its costs.

### *Conclusion*

### **ORDER**

[118] In the circumstances, the following Order is made:

- [1] The following parties are granted leave to intervene in the above application:
  - 1.1. Emfuleni for Change NPC, as the first intervening applicant;
  - 1.2. ATC (Pty) Ltd, trading as Cbi-Electric African Cables, as the second intervening applicant;
  - 1.3. Scaw South Africa (Pty) Ltd as the third intervening applicant;
  - 1.4. Hall Longmore Holdings (Pty) Ltd as the fourth intervening applicant.
- [2] The first respondent, ("Emfuleni"), is declared to be in contempt of the Full Court order issued on 18 November 2018 and the failure of Emfuleni to pay the first applicant, ("Eskom"), for continued provision of electricity is declared unlawful and unconstitutional.
- [3] The second respondent, the Municipal Manager, is declared to be in contempt of the Full Court order issued on 18 November 2018 and the failure of Emfuleni to pay the first applicant, Eskom, for continued provision of electricity is declared unlawful and unconstitutional.

conditions and to safeguard the interests of Eskom and the first to fourth intervening applicants, and such failures are declared to be unlawful and unconstitutional.

[5] Emfuleni must appoint Eskom as its service delivery agent and provider to perform all functions and provide all services relating to Emfuleni's electricity business on behalf of Emfuleni (the "Agency") and as service delivery agent and provider:

- 5.1. Eskom shall be entitled to collect all revenues due to the Emfuleni in respect of the electricity distribution function and ensure that the funds are paid into a separate ring-fenced account to be opened in the name of Emfuleni (the "Account");
- 5.2. Eskom shall be authorised to charge to the Account all costs and expenses incurred by Eskom in discharging its duties in terms of the Agency and the amounts which Emfuleni is liable to pay Eskom for the electricity supplied by Eskom calculated at NERSA approved tariffs.
- 5.3. Emfuleni shall pay Eskom, in relation to the services rendered by Eskom in respect of the Agency, such amounts as NERSA may determine from time to time on application by Eskom;
- 5.4. In relation to the Agency, Eskom shall account to Emfuleni quarterly and pay the net revenue (calculated as the difference between the Eskom tariff and Emfuleni's municipal tariff less the costs envisaged in terms of paragraphs 4.2 and 4.3 above) over to Emfuleni.

[6] Eskom and Emfuleni, subject to appropriate oversight from NERSA, must finalise the terms of the agreement established by this order within six months of the date of this order.

[7] The agreement which shall contain the provisions stipulated under 5 and details and dates regarding how the electricity business of Emfuleni will be handed over to Eskom to enable Eskom to perform its functions as service delivery agent of Emfuleni.

[8] Pending the finalisation and implementation of the Agreement between Eskom and Emfuleni and with immediate effect:

8.1. The 1st to 8th applicants in the Cape Gate matter and the Emfuleni electricity customers (listed in Schedule "A" to Eskom's Notice of Motion) are authorised and directed, subject to appropriate oversight by NERSA, to discharge the debts which they incur to Emfuleni in respect of the ongoing supply of electricity to them by: -

8.1.1. Making payment directly to Eskom for the electricity they consume at the rate of the Eskom tariff and furnishing to Emfuleni proof of the payments made to Eskom;

8.1.2 Continuing to pay the difference between municipal tariff and the Eskom tariffs (i.e. the municipal portion) to Emfuleni.

8.2. Eskom is authorised and directed to issue invoices to the electricity customers which specify the Eskom tariff (the amount to be paid to Eskom for the electricity supplied under the invoice) and the Emfuleni tariff (the amount to be paid to Emfuleni for electricity supplied under the invoice) separately and Emfuleni will assist and cooperate with Eskom in this regard which includes furnishing the details of customers and allow Eskom to repair and install new or parallel meters at the supply points of the customers.

[9] Eskom's appointment as service delivery agent may only be terminated by agreement between Eskom, Emfuleni and NERSA, failing which this Court, after being satisfied that Emfuleni has developed sufficient administrative, financial and technical skills and capacity to discharge its obligations under the licence efficiently, accurately and sustainably to ensure access to a stable supply of electricity to residents of Emfuleni.

[10] If Eskom and Emfuleni are unable to finalise the terms of the agreement within six months:

10.1 Eskom and Emfuleni will file a Report to the Court within fourteen days of the expiry of the six-month period which sets out the steps taken to conclude the agreement pursuant to the order, the aspects in respect of

which there are agreements and the aspects in respect of which there are disagreements.

10.2 Following the filing of the Report, any party is permitted to file a supplementary affidavit and to set the application down before the Court for appropriate relief on not less than fourteen days' notice to the other parties.

- [11] Emfuleni and NERSA, jointly and severally, the one paying the other to be absolved, are ordered to pay the costs of all the applicants, and such costs are to include the costs of two counsel.



**SELBY BAQWA**  
Judge of the High Court  
Gauteng Division, Pretoria



**G MALINDI**  
Judge of the High Court  
Gauteng Division, Johannesburg



**I De Vos**  
Acting Judge of the High Court  
Gauteng Division, Johannesburg

Date of Hearing: 9 March 2023

Judgment delivered: 5 July 2023

APPEARANCES:

For the Applicant:

For the Intervening Applicants:

PL Uys Instructed by GMINC

M Du Plessis SC with S Pudifin-Jones  
instructed by Couzyn Hertzog and Horak

For the First Respondent:

Mokhari SC with J Langa instructed by  
Seleka Attorneys

For the Third Respondent:

A Platt SC with T Charlie instructed by  
Mchunu Attorneys